In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1703

BOATEL, INCORPORATED, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. 26) is reported at 490 F. 2d 990. The Board's decision and order (A. 63-74)[1] are reported at 204 NLRB No. 137. The Regional Director's decision in the related representation proceeding (Pet. 18-24) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1974 (Pet. 28). Petitions for rehearing and rehearing *en banc* were denied on April 3, 1974 (Pet. 27). The petition for a writ of certiorari was filed on May 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

---

[1]"A." refers to the printed appendix to the briefs in the court of appeals.

QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law because the court of appeals decided the case without hearing oral argument.

2. Whether the Board properly found that petitioner's stewards are "employees" and not "supervisors" within the meaning of the National Labor Relations Act.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Section 2(3). The term "employee" shall include any employee * * *, but shall not include * * * any individual employed as a supervisor * * *.
>
> Section 2(11). The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.
>
> Section 8(a). It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * * (5) to refuse to bargain collectively with the representatives of his employees * * *.
>
> Section 10(c). * * * [I]n its discretion, the Board upon notice may take further testimony or hear argument. * * *

STATEMENT

Boatel, Incorporated (the Company) provides food and housekeeping services to offshore drilling rigs in the Gulf of Mexico (Pet. 18). The Company utilizes crews varying from one to nineteen employees, which are headed by one or more "stewards." The crews are subject to the authority of platform supervisors employed by the customer corporations which own and staff the rigs (Pet. 19, 21-24).

The Company's stewards spend most of their time cooking, or preparing reports, and have only limited authority to direct the other Company employees within the confines of set working hours and routine duties (Pet. 23). All final personnel actions require the independent approval of Company officials (*ibid.*). The overall ratio of stewards to other Company employees is approximately 1 to 1.5 (Pet. 23).

On August 24, 1972, the Union[2] filed a petition requesting that an election be held among the Company's offshore employees (Pet. 18). Following a hearing, the Board's Regional Director rejected the Company's contention that stewards should be excluded as "supervisors" and ordered that an election be held in the requested unit (Pet. 18, 23). The Board denied the Company's request for review (Pet. 25). The Union won the election and was certified as the exclusive bargaining representative (A. 27-29).

When the Company refused to bargain, the Board's General Counsel issued a complaint alleging a violation of Section 8(a)(5) and (1) of the Act (A. 30-34). The Company's answer admitted the refusal to bargain and raised the claim that stewards were super-

---

[2]National Maritime Union of America, AFL-CIO.

visors as an affirmative defense (A. 37-40). The Board granted the General Counsel's motion for summary judgment and ordered the Company to bargain with the Union (A. 63-74). The court of appeals placed the case upon its summary calendar and enforced the Board's order without hearing oral argument (Pet. 26).

ARGUMENT

1. Petitioner contends that the court below abused its discretion by deciding the case without oral argument, when no oral argument was heard by either the Regional Director or the Board (Pet. 6-12). It is well settled, however, that opportunity for oral argument is neither included within the constitutional guarantee of due process of law nor required by the National Labor Relations Act. See Section 10(c), *supra*, p. 2 ; *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 275; *National Labor Relations Board* v. *Allied Distributing Corporation*, 297 F. 2d 679, 680-681 (C.A. 10).

Moreover, this Court has long sanctioned the use of summary appellate proceedings in criminal cases, where no substantial issue of law is presented. *Garrison* v. *Patterson*, 391 U.S. 464, 466; *Carafas* v. *LaVallee*, 391 U.S. 234, 242; *United States* v. *Johnson*, 327 U.S. 106, 113. It clearly follows that such proceedings are appropriate in civil cases where, as here, no substantial issue is presented. See, *e.g.*, *Mercado* v. *Commins*, 322 U.S. 465, 471; *Hicks-Ponder Co.* v. *National Labor Relations Board*, 424 F. 2d 538 (C.A. 5), certiorari denied, 400 U.S. 825.[3]

2. Petitioner also challenges the Board's finding that the Company stewards were not "supervisors" within the meaning of Section 2(11) of the Act (Pet. 12-16).

[3]Petitioner was afforded full opportunity to participate in the representation hearing and to submit written argument before the Regional Director, the Board, and the court of appeals.

That determination, involving application of well-established standards to the facts of this particular case, does not warrant further review. In any event, the Board's finding is correct. The presence of customer platform supervisors, the reservation of personnel decisions to Company officials, the non-supervisory character of the stewards' daily work, the lack of independent judgment exercised by the stewards, and the ratio of stewards to other employees all support the Board's finding that they are not supervisors. See *National Labor Relations Board* v. *Security Guard Service, Inc.*, 384 F. 2d 143 (C.A. 5); *Pulley* v. *National Labor Relations Board*, 395 F. 2d 870, 875 (C.A. 6); *National Labor Relations Board* v. *Swift & Company*, 292 F. 2d 561, 563 (C.A. 1); *Ross Porta-Plant, Inc.*, 166 NLRB 494, 496, enforced, 404 F. 2d 1180 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

JOHN G. ELLIGERS,
Attorney,
National Labor Relations Board.

JUNE 1974.